

1998

Todd Meeks v. Gunlock Water Users Association, Inc. : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 980086-CA

TODD MEEKS,)

Plaintiff/Appellant,)

v.)

Appellate No. 980086-CA

GUNLOCK WATER USERS)
ASSOCIATION, INC., a Utah)
Non-Profit Corporation, et. al.)
Defendants/Appellees.)

Argument Priority No. 15

BRIEF OF APPELLANT

Appeal from the Judgment and Orders of the District Court of the Fifth Judicial District,

the Honorable G. Rand Beacham, Presiding.

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FILED
Utah Court of Appeals

JUN 30 1998

Julia D'Alessandro

COMPLETE LIST OF ALL PARTIES

TODD MEEKS,)

Plaintiff/Appellant,)

vs.)

)

GUNLOCK WATER USERS
ASSOCIATION, INC., a Utah)

Non-Profit Corporation, MICHAEL
BRACKEN, KALVIN BOWLER,)

LARRY JESSUP, ROGER
HUMPHRIES, LARRY SHURTLIFF,)

JAY LEAVITT, EDWARD BOWLER,
GAIL SMITH, KRISTA ADAMS,)

RUTH MCKEAN, DIANN
COVINGTON, ROXANNE)

APLANALP, JOHN DOES 8-20, JANE
DOES, 6-10, Individuals.)

Defendants/Appellees.)

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JURISDICTION OF THE UTAH COURT OF APPEALS

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Annotated, Sec. 78-2a-3(2)(k) (1997).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1

Whether the facts as presented in the form of corporate minutes and Affidavit in Plaintiff/Appellant's Objection and explained during oral argument which were not objected to by Defendants and, in fact, relied on by Defendants in their argument presented material facts sufficient to withstand Summary Judgment, despite an apparent non-conformance with Utah Code of Judicial Administration 4-501(2).

STANDARD OF REVIEW

Summary judgment does not resolve factual issues. Therefore, summary judgments are reviewed only with regard to questions of law, which are reviewed for "correctness, according no particular deference to the trial court." Transamerica Cash Reserve, Inc. v. Dixie Power & Water, 789 P.2d 24, 25 (Utah 1990); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 887 (Utah 1988). In determining whether the trial court correctly concluded that there was no genuine issue of material fact, the facts and inferences to be drawn therefrom should be viewed in the light most favorable to the losing party. Hamblin v. City of Clearfield, 795 P.2d 1133, 1135 (Utah 1990).

ISSUE NO. 2

Even if the Trial Judge ruled in favor of Defendant's Statement of Material Facts based upon Utah Code of Judicial Administration 4-501(2), whether Plaintiff/Appellant's oral argument and submissions raised issues of material fact in behalf of his cause of action for Breach of Contract and Violation of Fiduciary Duty sufficient to withstand Summary Judgment.

STANDARD OF REVIEW

Summary judgment does not resolve factual issues. Therefore, summary judgments are reviewed only with regard to questions of law, which are reviewed for "correctness, according no particular deference to the trial court." Transamerica Cash Reserve, Inc. v. Dixie Power & Water, 789 P.2d 24, 25 (Utah 1990); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 887 (Utah 1988). In determining whether the trial court correctly concluded that there was no genuine issue of material fact, the facts and inferences to be drawn therefrom should be viewed in the light most favorable to the losing party. Hamblin v. City of Clearfield, 795 P.2d 1133, 1135 (Utah 1990).

ISSUE NO. 3

Whether the Trial Judge erred in refusing to consider evidence submitted by Plaintiff in the form of an Affidavit and Corporate minutes, holding that it lacked foundation to be considered when the evidence was not objected to by Defendant and where Defendant used said evidence in its own argument.

STANDARD OF REVIEW

Summary judgment does not resolve factual issues. Therefore, summary judgments are reviewed only with regard to questions of law, which are reviewed for "correctness, according no particular deference to the trial court." Transamerica Cash Reserve, Inc. v. Dixie Power & Water, 789 P.2d 24, 25 (Utah 1990); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 887 (Utah 1988). In determining whether the trial court correctly concluded that there was no genuine issue of material fact, the facts and inferences to be drawn therefrom should be viewed in the light most favorable to the losing party. Hamblin v. City of Clearfield, 795 P.2d 1133, 1135 (Utah 1990).

ISSUE NO. 4

Whether or not a Trial Court can refuse to consider a material fact for Summary Judgment purposes that is admitted by both parties in oral argument and admitted by the Defendants in their Answer.

STANDARD OF REVIEW

Summary judgment does not resolve factual issues. Therefore, summary judgments are reviewed only with regard to questions of law, which are reviewed for "correctness, according no particular deference to the trial court." Transamerica Cash Reserve, Inc. v. Dixie Power & Water, 789 P.2d 24, 25 (Utah 1990); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 887 (Utah 1988). In determining whether the trial court correctly concluded that there was no genuine issue of material fact, the facts and inferences to be

drawn therefrom should be viewed in the light most favorable to the losing party. Hamblin v. City of Clearfield, 795 P.2d 1133, 1135 (Utah 1990).

ISSUE NO. 5

Whether the Trial Judge committed error in stating that “Plaintiff concedes that his case should have been filed as a derivative action”, when, during oral argument, Plaintiff’s counsel stated only a portion of the claim should have been filed that way.

STANDARD OF REVIEW

Summary judgment does not resolve factual issues. Therefore, summary judgments are reviewed only with regard to questions of law, which are reviewed for “correctness, according no particular deference to the trial court.” Transamerica Cash Reserve, Inc. v. Dixie Power & Water, 789 P.2d 24, 25 (Utah 1990); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 887 (Utah 1988). In determining whether the trial court correctly concluded that there was no genuine issue of material fact, the facts and inferences to be drawn therefrom should be viewed in the light most favorable to the losing party. Hamblin v. City of Clearfield, 795 P.2d 1133, 1135 (Utah 1990).

ISSUE NO. 6

Whether the Trial Judge committed error in stating that Plaintiff’s Affidavit claiming specific incidences of properties receiving water from the main line, claiming a corporate lack of knowledge of the Service Area, claiming confusion regarding the denial of his request from the Corporate Minutes, refuting certain claims of Defendants regarding an upgrade to

the system and claiming to have paid monies to the Corporation while it was not incorporated, should not be “included in the facts before the Court”.

STANDARD OF REVIEW

Summary judgment does not resolve factual issues. Therefore, summary judgments are reviewed only with regard to questions of law, which are reviewed for “correctness, according no particular deference to the trial court.” Transamerica Cash Reserve, Inc. v. Dixie Power & Water, 789 P.2d 24, 25 (Utah 1990); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 887 (Utah 1988). In determining whether the trial court correctly concluded that there was no genuine issue of material fact, the facts and inferences to be drawn therefrom should be viewed in the light most favorable to the losing party. Hamblin v. City of Clearfield, 795 P.2d 1133, 1135 (Utah 1990).

ISSUE NO. 7

Whether the Trial Judge committed error by stating that, “Plaintiff cites no authority for such an argument, and the Court is aware of none”, when Plaintiff’s counsel specifically cited in his Objection and Memorandum and oral argument Utah case law where a constructive trust had been held.

STANDARD OF REVIEW

Summary judgment does not resolve factual issues. Therefore, summary judgments are reviewed only with regard to questions of law, which are reviewed for “correctness, according no particular deference to the trial court.” Transamerica Cash Reserve, Inc. v.

Dixie Power & Water, 789 P.2d 24, 25 (Utah 1990); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 887 (Utah 1988). In determining whether the trial court correctly concluded that there was no genuine issue of material fact, the facts and inferences to be drawn therefrom should be viewed in the light most favorable to the losing party. Hamblin v. City of Clearfield, 795 P.2d 1133, 1135 (Utah 1990).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,

ORDINANCES AND RULES

Utah Code Ann. § 16-6-99.1

Suspension--Notice--Failure to remove suspension

(1) A domestic corporation that remains delinquent for more than 30 days after the mailing of the notice of delinquency under Section 16-6-99 shall be suspended. If a corporation is suspended under this section or under Section 59-7-534, the division shall mail a notice of suspension to the corporation, unless the corporation's certificate of incorporation is already suspended for any reason. A corporation that is suspended continues its corporate existence and may carry on any business if it also takes the necessary steps to remedy its suspended status and restore the corporation to good standing.

(2) A notice of suspension shall state:

(a) that the certificate of incorporation of the corporation has been suspended;

(b) the reason for the suspension;

(c) the date of the suspension;

(d) that the corporation may remove the suspension by correcting the delinquency and paying a reinstatement fee determined by the division pursuant to Section 63-38-3.2, in addition to any fees required by Section 16-6-100, or, if its certificate of incorporation has been suspended under Section 59-7-534, by complying with the provisions of Section 59-7-536; and

(e) that the corporation will be dissolved 120 days after the date of mailing the notice of suspension unless the corporation has removed the suspension before that time.

(3) The division shall include an annual report form with any notice of suspension under this section for failure to file an annual report.

(4) If the corporation does not remove the suspension within 120 days after the date of mailing the notice of suspension, the corporation shall be dissolved. The division shall mail a certificate of dissolution to the corporation. A dissolved corporation may not be revived under this chapter or Section 59-7-536, except as provided in Subsection (5). The dissolution of any corporation precludes that corporation from doing business in its corporate character under any name or assumed names filed on behalf of the dissolved corporation under Section 42-2-5. On the date of dissolution, the corporation's right in any assumed names it may use is suspended. The name of the dissolved corporation and any assumed names filed on its behalf are not available for one year from the date of dissolution for use

by any other domestic corporation, foreign corporation transacting business in this state, or person doing business under an assumed name under Section 42-2-5.

(5) Any corporation which has been dissolved under this section may, within one year from the date of dissolution, be reinstated upon application and payment of all past due taxes, penalties, and reinstatement fees.

(6) All notices and certificates under this section shall be mailed first-class, postage prepaid, and shall be addressed separately to the registered agent and at least one officer of the corporation who is not the registered agent or to two officers if there is no registered agent of record at their most current mailing addresses appearing on the records of the division.

Utah Code Ann. § 16-6-106

Liability for unauthorized assumption of corporate powers

All persons who assume to act as a nonprofit corporation without authority to do so shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof.

Utah Rule of Civil Procedure 56

Summary Judgment

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary

judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief

is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Utah Code of Judicial Administration 4-501(2)

Motions for summary judgment.

(a) Memorandum in support of a motion. The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(b) Memorandum in opposition to a motion. The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to

the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

STATEMENT OF THE CASE

1. NATURE OF THE CASE

The Gunlock Water Users Association, Inc. was originally incorporated as a non-profit organization under the laws of the State of Utah on or about March 9, 1970. On or about April 4, 1990, Plaintiff purchased and received 100 shares in the Defendant Corporation. The Corporation was involuntarily dissolved on or about September, 1992 for an alleged failure to file annual reports. The Corporation was refiled on or about April 13, 1995 as a non-profit corporation under the laws of the State of Utah. .

On or about December 8, 1994, a written request for three taps for property owned by the Plaintiff in or near the Gunlock Service area was made to the Corporation. On December 27, 1994 the request was denied at a meeting of the Board. The Plaintiff had requested that he be present at the meeting but his request was denied. It was not clear from the minutes that the Board was in complete agreement on why the request was denied.

Another written request was made on August 8, 1995. He was denied. The minutes from the August 9, 1995 meeting show there was a difference among the Board as to why it was denied.

The minutes of a Board Meeting held January 17, 1995, showed that no one could define the geographical area served by the Gunlock Water Users Association, Inc. and such boundaries were not formerly approved by the Board until June 16, 1996.

The Plaintiff filed suit and later amended the Complaint, alleging the following: the Defendant Corporation was unincorporated for a period of time dating from September of 1992 until April of 1995; that the Corporation had Bylaws which provided for members of the Corporation to receive additional water and gave the Board of Directors certain powers to honor such requests, that the Plaintiff requested additional water taps and was denied said requests on numerous times, that the Corporation had wrongfully denied the Plaintiff requests for water and that the Board denied those requests for reasons other than those permitted under the Bylaws; that the Board had violated its authority under the Bylaws in said denials, that the denials were discriminatory in nature and that during its period of non-incorporation, the Directors and Officers of the Corporation were personally liable for actions taken by them in their capacity; that the Corporation had violated its fiduciary responsibility by assuming financial liabilities in an amount greater than was fiscally responsible; that the Corporation had spent Corporate funds in ways that were not authorized under the Bylaws; that the spending of such funds endangered the assets of the Corporation and that the Officers and Directors were personally liable for such actions during the period of non-incorporation.

Following a Motion For Summary Judgment by Defendants, the lower court dismissed the Plaintiff's action with prejudice.

2. COURSE OF THE PROCEEDINGS

The Complaint in this matter was filed on April 29, 1996. Some discovery was conducted by Defendants and an Amended Complaint was filed on October 17, 1996. On or about August 13, 1997, the Defendants submitted a Motion for Summary Judgment and a supporting Memorandum. On or about September 9, 1997, the Plaintiff submitted an Objection and Memorandum In Opposition to Motion For Summary Judgment. Defendants submitted a Reply Memorandum on or about September 19, 1997. Oral argument was held on October 23, 1997. On November 11, 1997, the Judge issued a Memorandum Decision granting the Defendants' Motion For Summary Judgment. An Order of Dismissal was signed on November 17, 1997 and filed November 18, 1997. Plaintiff/Appellant filed his Notice of Appeal on December 18, 1997.

3. DISPOSITION IN THE COURT ROOM

The Trial Court found that the Plaintiff had not submitted issues of material fact which sufficiently supported his claims and countered those of Defendants and dismissed his action with prejudice in its Order of Dismissal dated November 17, 1997.

4. STATEMENT OF FACTS

The Gunlock Water Users Association, Inc. was originally incorporated as a non-profit organization under the laws of the State of Utah on or about March 9, 1970. On

or about April 4, 1990, Plaintiff purchased and received 100 shares in the Defendant Corporation. The Corporation was involuntarily dissolved on or about September, 1992 for an alleged failure to file annual reports. The Corporation was refiled on or about April 13, 1995 as a non-profit corporation under the laws of the State of Utah (R.143, 236).

The Plaintiff owns property at 400 South, Gunlock, Utah and is a member of the Gunlock Water Users Association, Inc. (hereinafter referred to as GWUA). On or about April 4, 1990, Plaintiff purchased and received 100 shares in the Defendant Corporation (R.143, 246).

Article XI, Section 1 of the By-Laws of the Defendant Corporation require the Corporation to “Install, maintain and operate a main distribution pipeline or lines from the source of the water supply and service lines from the main distribution pipeline or lines to the property line of each member of the Corporation,”(R. 143, 236).

Article XI, Section 3 of the By-Laws of the Defendant Corporation allow each member to have “additional service lines from the Corporation’s water system in the discretion of the Board of Directors upon proper application therefore..... The approval of the Board of Directors of additional service lines to an existing member may be made conditional upon such provisions as the Board of Directors determine necessary to protect the interests of other members.....” (R.143, 236).

On or about December 8, 1994, a written request for three taps for property owned by the Plaintiff in or near the Gunlock Service area was made to the Corporation (R.

143, 171-172, 236). On December 27, 1994 the request was denied at a meeting of the Board (R. 171-172, 236, 373). The Plaintiff had requested that he be present at the meeting but his request was denied (R.171-172, 236, 373). It was not clear from the minutes that the Board was in complete agreement on why the request was denied (R.171, 236, 373).

Another written request through counsel was made on August 8, 1995 (R. 144, 173, 236). That request was also denied (R. 236). The minutes from the August 9, 1995 meeting show there was a difference among the Board as to why it was denied (R. 362-363).

The minutes of a Board Meeting held January 17, 1995, showed that no one could define the geographical area served by the Gunlock Water Users Association, Inc. (R.363-367) and such boundaries were not formerly approved by the Board until June 16, 1996 (R. 371).

The Complaint in this matter was filed on April 29, 1996 (R. 2). Some discovery was conducted by Defendants and an Amended Complaint was filed on October 17, 1996 (R. 140) alleging the following: the Defendant Corporation was unincorporated for a period of time dating from September of 1992 until April of 1995 (R. 143, 236); that the Corporation had Bylaws which provided for members of the Corporation to receive additional water and gave the Board of Directors certain powers to honor such requests (R. 143, 236), that the Plaintiff requested additional water taps and was denied said requests on numerous times (R. 144, 236), that the Corporation had wrongfully denied the Plaintiff requests for water and that the Board denied those requests for reasons other than those

permitted under the Bylaws (R. 146); that the Board had violated its authority under the Bylaws in said denials (R.146), that the denials were discriminatory in nature (R.146) and that during its period of non-incorporation, the Directors and Officers of the Corporation were personally liable for actions taken by them in their capacity (R. 146-147); that the Corporation had violated its fiduciary responsibility by assuming financial liabilities in an amount greater than was fiscally responsible (R. 147); that the Corporation had spent Corporate funds in ways that were not authorized under the Bylaws (R. 147-148); that the spending of such funds endangered the assets of the Corporation (R. 148) and that the Officers and Directors were personally liable for such actions during the period of non-incorporation (R.149).

On or about August 13, 1997, the Defendants submitted a Motion for Summary Judgment and a supporting Memorandum accompanied by Affidavits (R. 253-333). The grounds for their Motion were that the Plaintiff's claims were not properly raised as a shareholders' derivative action, that if the corporation didn't exist, the Bylaws did not impose duties and that the Defendants properly exercised their discretion to deny the requests for taps (R. 256-265).

On or about September 9, 1997, the Plaintiff submitted an Objection and Memorandum In Opposition to Motion For Summary Judgment (R. 347-387). The grounds for the Objection were that issues of material fact existed which should defeat a Summary Judgment (R.347-354). Accompanying the Opposition were copies of Minutes of the Board

of Directors for the various Meetings where the Plaintiff's Requests were denied and also meetings where it was clear that the Board did not know what the boundaries of their service area were (R.367-368, 371, 375). The Plaintiff's Objection and Memorandum was also accompanied by an Affidavit of the Plaintiff which described actions by Board Members and others which showed several water taps owned by other Board Members and Officers which were either "outside the Service Area" or "not adjacent to the main line"(R. 374). Plaintiff stated that he was awaiting the Answers to Discovery Requests and that he had never been instructed there would be a need to upgrade the system or that it would require additional service lines (R. 374). Plaintiff also stated in the Affidavit that in January of 1996, the Minutes of the Corporation showed that there were an additional 28 taps over and above the 100 the Corporation had claimed when they denied him water (R. 375). The Affidavit also showed how the Plaintiff had continued to give the Defendant Corporation money during the period of time it was not incorporated and that he believed they had failed to act "in a fiduciary manner" (R. 375-376). Minutes of the Corporation were included with the Objection which showed that the Board of Directors had approved the purchase of a trailer park (R. 377, 380), the eviction of the tenants of the park (R. 381), allowing one or two individuals to stay "rent free" in the park to take care of it (R. 382), that the GWUA was in charge of fire protection, street lights "or a park" for the "town" and that they knew it was not in their authorized powers (R. 382, 387), and that they knew they were an unincorporated entity (R.365). The Objection and Memorandum incorporated each of these Exhibits by

Reference and no objection to any of them was ever raised by the Defendants. In fact, Defendants referred to them in their Reply Memorandum of September 19, 1997 (R. 388-394) and their oral argument.

Oral argument was held on October 23, 1997 (R.419-429). During oral argument, Plaintiff's counsel demonstrated how the evidence set forth in the Exhibits and Affidavit showed that material facts existed which should be heard at trial (R. 422, 424-427). Plaintiff's counsel also cited case law supporting constructive trusts (R. 423). Defendants appeared to admit during argument that they were unincorporated for the period of time claimed by Plaintiff and in fact, they had already admitted it in their Answer to Amended Complaint (R. 236).

On November 11, 1997, the Judge issued a Memorandum Decision dismissing the case with prejudice, citing that no evidence creating material fact was presented by the Plaintiff (R. 405), that the facts as stated by Defendants in their Memorandum in Support of the Motion For Summary Judgment (minus certain conclusory paragraphs) would be deemed admitted due to an apparent failure of the Plaintiff/Appellant to conform with Utah Code of Judicial Administration 4-501(2)(b) (R. 403). The Court also found that no evidence was presented about the unincorporated status of the Defendant corporation (R. 404) and that Plaintiff's counsel had conceded the case should be filed as a derivative action (R. 404), but refused to consider the argument of personal liability of the Defendants due to a lack of evidence (R. 404).

The Order of Dismissal was signed on November 17, 1997 and filed November 18, 1997 (R. 407-409). Plaintiff filed its Notice of Appeal on December 18, 1997 (R. 411-412).

SUMMARY OF ARGUMENTS

Plaintiff/Appellant's arguments can be easily summed up as follows: the Trial Court erred in refusing to consider evidence submitted by Plaintiff in Affidavit form and supplemented by Minutes of the Corporation. Such evidence raised issues of material fact sufficient to be heard at trial with regard to the issues of breach of contract, violation of fiduciary duty, and discriminatory acts. The trial Court erred in failing to consider the fact that the Defendant Corporation was unincorporated when both parties had argued that fact orally and the Defendants had admitted it in their Answer to the Amended Complaint. The Trial Court further erred when ruling that Plaintiff/Appellant had not cited any authority regarding "constructive trusts" and that Plaintiff's counsel had admitted the action should have been filed as a derivative shareholder action.

Based upon the Trial Court's erroneous ruling that Plaintiff/Appellant had not submitted evidence showing issues of disputed material fact and that there was no proof that the Corporation was not in existence and its mistaken rulings with regard to the constructive trust argument and that the action should have been filed as a derivative shareholder action, the Summary Judgment granted to Defendants should be reversed and the case should be remanded to the Trial Court for further Discovery and a trial on all issues of the case.

I. EVIDENTIARY ISSUES

1. Trial Court Improperly Failed To Consider Evidence In Favor Of Plaintiff By Not Viewing The Plaintiff's Evidence In the Light Most Favorable To Him.

“A summary judgment must be supported by evidence, admissions and inferences which when viewed in the light most favorable to the losing side establishes ‘there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.’” Bihlmaier v. Carson, 603 P.2d 790, 791-792 (Utah 1979), quoting Utah R. Civ. P. 56(c).

Here, the Plaintiff submitted an Affidavit, which when combined from Corporate Minutes and the Defendant’s admissions in the pleadings, were not viewed in the light most favorable to him when they were considered by the Trial Court. The Trial Court held to a strict interpretation of U.C.J.A. Rule 4-501(2) and deemed that the Defendant’s Statement of Material Facts was sufficient for Summary Judgment, but did not consider the Plaintiff’s submissions since it did not “specifically controvert any fact asserted by defendants or to make any specific reference to defendants’ facts.” The Trial Court further held that it contained “no citations to the record, except for references to exhibits which are not presented with any foundational affidavits.”

The Court failed to note that the exhibits which lacked the “foundational affidavits” were not objected to by the Defendants nor did they file a Motion To Strike. Their failure to do so under Utah law waives any objection thereto. Howick v. Bank of Salt

Lake, 498 P.2d 352, 353-354 (Utah 1972). The Trial Court erred in refusing to consider the Corporate Minutes as presenting issues of genuine material fact.

As recently as 1989, the Utah Supreme Court has held that while inadmissible evidence cannot be considered in summary judgment considerations, Affidavits which are defective (including their failure to be notarized) must be objected to on a Motion To Strike or the objections to them are deemed waived. D & L Supply v. Saurini, 775 P.2d 420, 421 (Utah 1989), *citing*, Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983), Hobelman Motors, Inc. v. Allred, 685 P.2d 544, 546 (Utah 1984) (affidavit in opposition to motion for summary judgment not properly notarized, but objection waived where not timely made); and Franklin Fin. V. New Empire Dev. Co., 659 P.2d 1040, 1044 (Utah 1983) (even if affidavits in support of summary judgment were defective, party opposing summary judgment motion failed to move to strike and was deemed to have waived his opposition to evidentiary defects).

The disputed minutes affirm Plaintiff's claim that the Defendants were unclear as to why they twice denied his requests for additional water taps, that the Corporation had been dissolved during this time, that the Defendants did not know where the boundaries of their service area were (which was one of their alleged grounds for denial), that the Defendants knew they were not authorized to spend Corporate monies on fire protection, street lights and the donation of the trailer park. All of these claims are issues of fact which

would be material to the Plaintiff proving his causes of action for Breach of Contract and Violation of Fiduciary Duty, as outlined in the Amended Complaint.

Even if the Trial Judge's ruling in favor of Defendant's Statement of Material Facts based upon Utah Code of Judicial Administration 4-501(2) was correct, the issues described in the preceding paragraph raise issues of material fact in behalf of his causes of action for Breach of Contract and Violation of Fiduciary Duty sufficient to withstand Summary Judgment. The Defendants' Statement of Material Facts merely shows specific instances of where the Defendants supposedly acted the same way they did against Plaintiff; but it doesn't address the issues of improper conduct as claimed by the Plaintiff. It also does not address the issue of the boundaries, as claimed by the Defendants in their supporting Affidavits to the Motion For Summary Judgment and which are directly contradicted by the Minutes submitted by Plaintiff and not objected to by Defendants.

II. The Court Committed Plain Error By Failing To Consider Admissions By Defendants Of The Corporation's Dissolved Status, By Misstating Arguments By Plaintiff's Counsel and By Failing To Consider Authority Cited By Plaintiff

Summary judgments are reviewed only with regard to questions of law, which are reviewed for "correctness, according no particular deference to the trial court." Transamerica Cash Reserve, Inc. v. Dixie Power & Water, 789 P.2d 24, 25 (Utah 1990); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 887 (Utah 1988).

The Trial Court erred in refusing to consider the dissolved status of the Corporation. Both parties referred to it in their Memoranda and oral arguments and the Defendants admitted it in their Answer to the Amended Complaint. It was plain error for the Trial Court to refuse to consider this fact. The Trial Court's failure to consider the period of time the corporation was dissolved caused it to improperly rule that a derivative shareholder action should have been brought and that the Plaintiff had no Cause of Action against the Corporation or against the individuals. Had the Trial Court done so, the individuals would clearly have been personally liable to Plaintiff for their actions. See Utah Code Annotated, Section 16-6-106.

The Trial Court committed plain error when it stated that, "Plaintiff concedes that his case should have been filed as a derivative action", when, during oral argument, Plaintiff's counsel stated only that portion of the period of time when the Corporation was in existence might apply to Rule 23.1. In his argument, Plaintiff's Counsel stated that those issues "[could] easily be cleaned up as part of the pre-trial order . . ." This failure of the Trial Court heavily impacted its ruling that the Plaintiff had Causes of Action against the Defendants.

It was also plain error for the Court to hold that Plaintiff, "cite[d] no authority for such an argument [that the actions of Defendants created a "constructive trust"]". In his argument, Plaintiff's counsel clearly cited a 1949 Utah case, Haws v. Jensen, quoting, "A court of equity, in decreeing a constructive trust, is bound by no unyielding formula." A large portion

of Plaintiff's oral argument was spent explaining to the Trial Court exactly why a constructive trust should be held in this case.


CONCLUSION

The Trial Court in this case clearly erred by failing to consider evidence which was not objected to by Defendants, by failing to properly consider that the evidence specifically created genuine issues of material fact with regard to the Causes of Action claimed by Plaintiff had been held. The Trial Court failed to view this evidence in the light most favorable to the Plaintiff, as required by the Rule and Utah case law. Doing so would have required the Court to overlook any "deficiencies" since Defendants' failure to object or file a Motion To Strike waived such deficiencies.

The Trial Court also failed to appropriately rule on the record before it with regard to the issue of the dissolved status of the corporation, the arguments of Plaintiff's counsel with regard to the applicability of shareholder derivative status and also Utah case law regarding constructive trusts.

Based upon these clear errors, the Summary Judgment against Plaintiff should be overturned and the case remanded to the Trial Court for further proceedings.

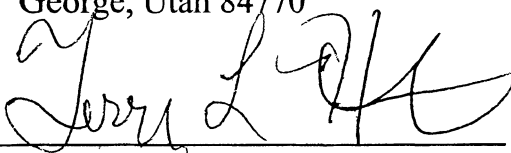
DATED this 29 day of June, 1998.



TERRY L. HUTCHINSON,
SLEMBOSKI & HUTCHINSON, L.L.C.

I, Terry L. Hutchinson, certify that on June 29, 1998, I served two copies of the attached Brief of Appellant upon Stephen H. Urquhart, the counsel for the appellee in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Stephen H. Urquhart
THOMPSON & ASSOCIATES
148 East Tabernacle
St. George, Utah 84770



Attorney of Record

COPY

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**IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH**

TODD MEEKS,	)	OBJECTION AND MEMORANDUM
	)	IN OPPOSITION TO MOTION FOR
Plaintiff,	)	SUMMARY JUDGMENT
vs.)	
)	
GUNLOCK WATER USERS)	
ASSOCIATION, INC., a Utah)	
Non-Profit Corporation, et al.)	
	)	Civil No. 960500529 CV
Defendant.)	

Plaintiff, Todd Meeks, by and through counsel, submits this Objection and supporting Memorandum to the Motion For Summary Judgment submitted by the Defendants. The grounds for said objection are that the individually named Defendants and Defendant Corporation are properly named in the law suit and are liable to the Defendant and, that the individually named officers and directors abused their discretionary act within the scope of their authority in denying the Plaintiff's request for water.

It is well established that where there are disputed issues of material fact that Summary Judgment is improper. Young vs. Thornia, 244 P2d 862 (Utah 1952.).

STATEMENT OF FACTS

1. The Plaintiff owns property at 400 South, Gunlock, Utah and is a member of the Gunlock Water Users Association, Inc. (hereinafter referred to as GWUA). On or about April 4, 1990, Plaintiff purchased and received 100 shares in the Defendant Corporation.

2. Article XI, Section 1 of the By-Laws of the Defendant Corporation require the Corporation to “Install, maintain and operate a main distribution pipeline or lines from the source of the water supply and service lines from the main distribution pipeline or lines to the property line of each member of the Corporation,”.

3. Article XI, Section 3 of the By-Laws of the Defendant Corporation allow each member to have “additional service lines from the Corporation’s water system in the discretion of the Board of Directors upon proper application therefore..... The approval of the Board of Directors of additional service lines to an existing member may be made conditional upon such provisions as the Board of Directors determine necessary to protect the interests of other members.....”

4. On or about December 8, 1994, a written request for three taps for property owned by the Plaintiff in or near the Gunlock Service area was made to the Corporation. On December 27, 1994 the request was denied at a meeting of the Board. The Plaintiff had requested that he be present at the meeting but his request was denied.

It was not clear from the minutes that the Board was in complete agreement on why the request was denied. A copy of the minutes of the meeting are attached as Exhibit A.to this Memorandum and incorporated herein by reference.

5. Another written request was made on August 8, 1995. He was denied. The minutes from the August 9, 1995 meeting show there was a difference among the Board as to why it was denied. A copy of said Minutes are attached as Exhibit B, and incorporated herein by reference.

6. The minutes of a Board Meeting held January 17, 1995, showed that no one could define the geographical area served by the Gunlock Water Users Association, Inc. and such boundaries were not formerly approved by the Board until June 16, 1996. A copy of said minutes for January 17, 1995 and April 16, 1996 are attached as Exhibits C and D and incorporated herein by reference.

7. The Gunlock Water Users Association, Inc. was originally incorporated as a non-profit organization under the laws of the State of Utah on or about March 9, 1970. The Corporation was involuntarily dissolved on or about September, 1992 for an alleged failure to file annual reports. The Corporation was refiled on or about April 13, 1995 as a non-profit corporation under the laws of the State of Utah.

ARGUMENT ONE

**THE OFFICERS AND DIRECTORS OF GUNLOCK WATER
USERS ASSOCIATION, INC. ARE LIABLE TO THE DEFENDANT
IN THEIR INDIVIDUAL CAPACITIES.**

Utah Code Annotated §16-6-99.1(4) states that a Corporation which does not remove a suspension within 120 days after the Notice is mailed, is dissolved. The U. C. A. further states in §16-6-106 “All persons who assume to act as a non-profit corporation without authority to do so, shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof.” These two statutes indicate that each and every officer of the Corporation who participated in, performed, and approved actions between September, 1992 and April, 1996 re incorporation are personally and severally liable for all of the debts and liabilities incurred by their unauthorized actions as a non-profit corporation. These debts and liabilities include the purchase of the trailer park, the financial dealings of the corporation as well as the distribution of the monies contributed by the members. They also include an individual obligation to Plaintiff.

ARGUMENT TWO

THE DEFENDANTS HAVE A FIDUCIARY DUTY TO THE PLAINTIFF BASED UPON THEIR CONDUCT AND UNAUTHORIZED ACTIONS AS A NON-PROFIT CORPORATION.

During the period of time that the Gunlock Water Users Association, Inc. was unincorporated, the Plaintiff continued to pay the monthly water fees in accordance with the obligations which existed prior to the dissolution of the Corporation. In addition, the Directors and Officers of the Corporation continued to do business and allegedly rely upon the by-laws and rules prior to its dissolution. At some point, the officers and directors were informed that they were not officially registered as a corporation by their

counsel, Ron Thompson. See the minutes dated August 22, 1994, a copy of which is attached as Exhibit E and incorporated herein by reference.

The actions of both parties in continuing to do business as if there were a corporation forms a type of contract or agreement between them or an understanding that both sides would continue to be bound as if there were a corporation. This might be termed as a “constructive trust.” The Plaintiff’s ignorance as to the official corporate status does not change the relationship between the parties. The Defendants were continuing to take money from him and other members and manage assets under the same basic understandings. Therefore, the Defendants had a contractual and fiduciary responsibility to him. As evidenced in the Affidavit of Todd Meeks in Opposition to Motion of Summary Judgment, there are claims of material fact, which if true, could result in a finding that the Defendants had, in fact, violated there contractual and fiduciary responsibilities to him. A copy of the Affidavit of Todd Meeks is attached hereto as Exhibit F and is incorporated herein by reference.

ARGUMENT THREE

DUE TO THE LACK OF CORPORATE EXISTENCE, THE UNINCORPORATED GUNLOCK WATER USERS ASSOCIATION, INC. SHOULD CONTINUE TO BE A DEFENDANT IN THIS LAWSUIT SINCE IT HOLDS OR HELD ASSETS AS AN UNINCORPORATED ENTITY. SUCH STATUS AS A DEFENDANT IS NOT SUBJECT TO URCP 23.1.

During the period of time in which Gunlock Water Users Association, Inc. was unincorporated, the directors purchased a piece of real property on behalf of the corporation known as “Trailer Park”. They subsequently evicted the tenants, sold all remaining trailers and have operated the park with an intention to donate it to the township of Gunlock. These actions are in the minutes attached as Exhibit G and incorporated herein by reference.

The Plaintiff had intended to show evidence of the improper use of Gunlock Water Users Association, Inc. funds by the Board since the date of his membership to the Board. After review of the cases regarding derivative suits submitted by the Defendant, the Plaintiff concedes that during the time of incorporation his cause of action should have been filed as a shareholder derivative suit in accordance with URCP 23.1. The Plaintiff continues to contend that an unincorporated entity known as Gunlock Water Users Association, Inc. continued to exist by holding bank accounts, holding title to real property, and buying and selling said property. This entity was not a corporation and therefore, URCP 23.1 does not apply.

The current incarnation of Gunlock Water Users Association, Inc. , incorporated sometime in April, 1996, should also continue to be a party to this action due to its acquisition of assets in which Plaintiff had an individual interest during the period of time that the Gunlock Water Users Association, Inc. was not incorporated.

CONCLUSION

None of the three claims of the Defendants should be sufficient to dismiss

this action. URCP 23.1 might require a small portion of this action to be dismissed from the time to Plaintiff became a member until the time GWUA was dissolved in September, 1992 or the Plaintiff should be required to Amend the Complaint to comply with URCP 23.1.

This situation however, does not require the dismissal of the entire lawsuit. In fact, Utah statute and case law is clear that the other individuals named in this suit are personally and severally liable for all the debts and liabilities incurred by their unlawful action as a non-profit corporation. It is this unauthorized action which the Plaintiff alleges forms the breach of contractual and fiduciary responsibilities to him and it is this that does not require URCP 23.1 to apply. In addition, the parties both continued to act in a manner, based upon their previous dealings during the period of Gunlock Water Users Association, Inc.'s incorporation and the Defendants should not be entitled to claim that they had no duties imposed by corporate by-laws. In fact, since they continued to take money from the Plaintiff and others for the continued operation of the corporation, they have an individual fiduciary duty to him.

Based upon the foregoing, the Plaintiff requests the Court to deny the Defendant's Motion For Summary Judgment.


DATED this 9 day of September, 1997.


TERRY L. HUTCHINSON
Attorney for Plaintiff

HAND DELIVERY CERTIFICATE

I hereby certify that on this 9 day of September, 1997, I did personally hand deliver a true and correct copy of the foregoing **OBJECTION AND MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** to the following:

Stephen Urquhart
THOMPSON & ASSOCIATES
148 East Tabernacle
St. George, Utah 84770



Secretary

EXHIBIT A

MINUTES OF DECEMBER 27, 1994

The meeting was called to order at 6:45 PM. Those in attendance were: Gail Smith, Truman Bowler, Jay Leavitt, Mike Bracken, Larry Jessup, and Ruth McKean.

The minutes of the last meeting were read and approved.

Truman said that he had talked to Mr. Lewis of the County Commission about a special service district and was told that all we needed to do was have 4 or 5 people of Gunlock meet with the County Commission, indicate their desire to form one, and there would be no particular problem. Truman also talked to Earl Snow of Pine Valley. They have a different situation than we do, but overall seem to be satisfied.

A discussion followed over who would control the water system. Gunlock or the County Commission. Since the board had voted in the meeting before to present this issue at the annual meeting it was decided to ask Ron Thompson to do this.

Larry had received a letter from the state about a water test we had not done this year. Larry requested a schedule of all water tests we need to do on a yearly basis. The state said that we had to inform the stockholders of failure to perform all these tests. Gail said she would like for this to be done before the elections at the annual meeting on Jan. 9th. She asked Ruth if she would do this before leaving. She agreed. Larry said he would fax a copy of the notice out the next day to the Smiths ranch office so Becky could deliver it to Ruth. Larry said that since this had happened on "Our" watch the notice should be dated in 1994, and would get the Notice Copy to Ruth the next day.

Mike wanted a list of the yearly tests to be done. Larry said he would put one together.

Ruth said she has received very few of the safe water certificates from Mike. He said he did not have any more.

Gail said a Mr. Steve Delong had contacted her on his and Todd Meeks behalf, about purchasing some water taps. She informed him that he needed to send in a letter asking for them. On Dec. 8th she received a letter referring to her conversation with him on Dec. 7th requesting 3 water taps for 31 acres south of the rodeo grounds. Gail said that just before leaving for this meeting Todd Meeks had called wanting to be present and she told him no that she would present the letter to the board and get back to him

Gail felt that this should be tabled since she did not know where our responsibility was in getting water to them.

Jay asked to make a comment. He said they have no right of way to the property and it was out of the city limits, or out of our jurisdiction. Jay said he nor Ed Bowler would give him a right of way. Jay said they were trying to get a right of way down the river for this line. He did not feel Gunlock could afford to do something like this. He said town limits are clearly defined, to the bridge. Mike said it was to the end of Rod's lower property.

Larry said two years ago in our annul meeting the motion carried to amend the by laws so that people developing outside the city limits pay for getting the water in and then we take over. But it must meet county specs. Larry said "We need to do a better job of defining what requirements we place on property holders and it needs to be written up on a form." He said that Brother Brown had started something like this before his death.

Mike said that the developer PAYS THE BILL. Larry said, "But we haven't gone down and had an attorney draft an amendment and attach it to our rules."

Jay made a motion to deny the request. There were no seconds.

Gail: What can they do legally.

Truman: Are they in the city limits?

Jay: As of today the property is land locked. Land Locked! They are trying to get the taps to use with the City of St George to get a right of way down the river. You should not run a culinary line down the river and run the risk of a break and contaminating all the rest of the water system.

Mike: Can't we legally table this thing?

Truman: Sure.

Jay: I made a motion to deny it. I want a vote on it.

Truman seconded the motion. It was unanimously approved.

Truman wanted to know if this should be denied under the letterhead of an attorney. This could be a landmark decision considering all the growth in the county.

Gail asked if we were ready for the annul meeting. Ruth said that Larry had not picked up the books as he said he would on the 10th of December and that Nick Lang did not show up for his appointment with her. She also said the inventory had not been delivered by Mike as promised. He said he had his boys take it over and they put it in the firehouse. Truman said that Tom needed to see the inventory and make the count. Ruth said that would be no problem. The problem was just getting board members to do what they say they will do when they say they will do it.

EXHIBIT B

Minutes for GWUA Board Meeting of 8-9-95

Meeting called to order at 8:00PM

Those in attendance were Jay Leavitt, Diann Covington, Roxanne Aplanalp, Ed Bowler, and Ruth McKean.

Roxanne made a motion to approve the minutes of the June meeting which had been distributed before hand. Diann seconded the motion. All approved.

Financial report given by Ruth indicated the monies were low due to the expensive chemical tests and the work done in the cul de sac. ~~With upcoming expenses to repair leak across from Kents,~~ and the installation of pipe across the river, Fire Dept insurance due in September of \$720.00, and bill from Ron Thompson for Incorporation, we're going to be hard pressed to meet all of these obligations.

Our accounts receivable is in good shape.

Roxanne mentioned that Ron Thompson has suggested we talk to the county commission for help on fire truck. They just paid Winchester Hills fire insurance. Jay said he would ask Brent Willoughby to do this and he would go along. Ed said we have always paid in the past and should pay now.

There were no bids on the computer or electric stands. Ruth said the meters on stands turned out to belong to Utah Power and they had removed them. The new price was would be \$125.00. Jay said he had one of them sold. We can run an ad in the Pioneer shopper to sell both.

PARK: Diann said she didn't think Jack Weed was doing all he could. Jay stated we need to give him some direction. Jacks contract does not cover stocking the Pepsi Machine, and he told Ruth he didn't want to collect the monies from laundry or vending machine. Ruth said she was doing it along with stocking the soda machine. She said it was hard work to load 20-30 cases of soda into the truck in 105° heat, but it had to be done. Ed said to pay someone to do it. Ruth said our finances require more volunteer's. Roxanne presented Park diagram that could be used as a guide for master plan. Jay said Jack needs to keep things mowed, trimmed, and watered. Also he thinks the wood fence should be finished as soon as we have the money. Roxanne said we need to give him specific tasks each month in addition to those in his contract.

Ruth said the dumpster had been down sized again and would save \$10.00 a month.

Water: Several water magazines were routed for Board review. Ed said he would not read them, and would rely on the others.

Roxanne said her meetings in Vernal and St. George were informative and continued to learn more about water.

The cost of doing the cul de sac had come close to the estimate made by Jay and Roxanne. Jay said he had the boxes for Rod Leavitt's, and the lot he sold. Roxanne stated that Paul Leavitt wants his other tap installed when we repair his connection.

Meter reading is holding, about the same as in March with the head house down about 6'. The power bill hadn't come in yet to know how much pump had turned on, if at all. Roxanne said the cemetery is using a lot of water since the sprinkler system had been installed using a 2" line. Jay said the 2" line had always been there and that he dug the trench for them but that a 2" line did not go into the cemetery, it is a delivery line only. Rox talked with Gail about the leak at the connection and will contact those who installed it. Ruth stated the cemetery does not own a water tap. Ed asked if cemetery was a problem with anybody? Rox said only if we caution others about overuse and let the cemetery run 4 hours at a time-it doesn't set a very good example, and for future finances. Ed said we would be scared to death at how much water is being used if we took a good look. He felt the cemetery was a municipal function.

Ernie Therriault, who is doing his thesis on the river after the Dam was built, received monies from Ron Thompson and the Conservancy District, and would be here in Aug and Sept interviewing.

Jay has found the leak in the river going to Pauls. He will fix the best he can, as in-expensively as possible. We need to worry about how were going to get money to fix good, because we don't have anywhere near the money it will take to do it right.

INVENTORY: Tom moved it to the new storage room. He assembled metal shelving, and recounted everything. A new door was necessary and a new locking door knob.

RODEO: Long discussion regarding Rodeo Fund raiser paying for Park.

Ruth: Need a letter from the rodeo for the files saying the rodeo was going help pay for the park. Ed: We don't need it because the rodeo committee, would go ahead and give/make a contribution toward what were doing. Thats a done deal, but my question is what are you asking. Ruth: Understanding was that the rodeo was going to pay for the park. Ed: Rodeo was going to underwrite the debt to Andy Wilson. Park is in GWUA's name. They own it. Ruth: With nothing in writing down the road and another Rodeo committee may choose to give us nothing and where does that leave the Water Co? Ed: Not a huge issue. Jay: "What we need to do is get it paid for." Ruth: The Water Co has spent \$7,050.00 to date (she passed out a list of these items). The

going to be the Water Co. who picks up the ball when the Park Acct runs out of money? Ron Thompson said, "We are not chartered to run a Park, have a Fire Dept, or provide street lights. If we are going to do all these things the SSD would be the way to do to avoid all these problems, or we could have our By Laws changed to cover these things". Ed: I think the rodeo club is going to come into enough money to make sure those back payments are paid and future payments are made. We are going to have to decide whether we're paying Utah Power, Laidlaw waste, how much money that is, so that that monthly expenditure does not come out of the water company. Ruth: Jay how do remember it? Jay: "I was in on the trading and all that. The park was going to belong to the town. The rodeo was going to help and make sure the monthly obligation was made because they knew the town water system could not stand that. And I talked to the rodeo committee about it. I want to keep water rates low and thats where the rodeo comes in to try and help, BUT we were also going to have fund raisers." We had good donations and could get more. Ed: The key is that the rodeo club committed to that monthly payment.. From the list there are 4 payments plus Ron Thompson. Now we need to decide what the monthly costs are going to be and they should take care of those monthly expenses for a whole year. Rox: Using the 4 months listed and Ron Thompsons fee and 540.00 X 12 to cover next years payments till the next rodeo, is 6,480.00. You add the 2,890.00 for a total of 9,370.00. Ed: "Yes" but we may not give that much because we may not have that much. If the rodeo club can come up with 7500.00? Diann: I don't think they have it. Ruth: Is the Water Co paying the other bills (Laidlaw, power, propane). Jay and Diann: Thought that the Water Co. was paying those bills and the rodeo was going to pay the mortgage bill.

Roxanne asked again for the currant balance of monies for the Water Co. Ruth: \$1,077.00, and my concern is the river crossing. Jay: "Thats why I'm trying to figure it as cheap as possible, and the irrigation will have to pay half of that. We need to go on and have fund raisers. I can tell you right now what the rodeo is going to be able to give you, Helen gave me an accounting on it and we tried real hard to help because it's a good thing BUT by the time we get \$5000.00 from the rodeo that just leaves us enough money to put on our rodeo on next year. We paid the cemetery for the year, and that kind of stuff for the year, so thats what your looking at getting right there.

Ed: The thing is we need to get what ever we can get, if it's \$5000.00 then it's 5000.00.

Rox: Then we have problems and need to plan another fund raiser.

Jay: Hey were strapping for money and need to do something here"

Ed: I think we need to approach the rodeo committee and see exactly what we can get and get it into the Water Boards coffers as soon as we can.

Rox: Do we need to have Ruth write up a letter?", Ed, "No I think so since Jay is right here we just need to get a

Jay asked what the pop machine was making us and Ruth said in less that a month we've made \$116.00 but thats not profit. They have not sent us a bill yet but I have purchased 32 cases myself at \$7.70/cs. So we are behind.

Rox, " I don't think we can count on the pop machine or laundry because of fluctuation, it can only be a buffer.

Rox: I will make a motion that the Water Boards understanding was that the rodeo fund raiser would underwrite the Park payment and Ron Thompsons legal bill and looking at that for the past due and the next 12 months that the Water Board would be asking the Rodeo for \$9,500.00 and will accept as close to that as we can get.

Ed: "\$9,500 is going to be an impossibility, but with the 2,000 we've got and what ever they can come up with, I think thats going to get us by."

Jay: We always knew the rodeo could not do the whole thing.

Diann: Maybe with the deer hunt coming up maybe we could do something like Veyo with baked goods"

Ruth: Last year there were hardly any deer hunters going through"

Rox: Is the rodeo committee going to make any money off of the dirt your removing? Jay: No we're just getting rid of it trying to make more parking"

Rox: Well I made a motion, I don't know what you want to do with it?"

Ed: Well, the motion was that we ask for \$9500 but take whatever we could get?

Rox: That the Boards understanding was the Rodeo Committee would help underwrite the monthly payments-and thats what it would be.

Ed: And I have no problem with that motion, I think Jay can take it and go from there with the understanding that the \$9500 isn't going to be there, but whatever we can get to underwrite that loan, I would second that motion.

VOTE: "All in favor?" For-Ed and Roxanne. Opposed-Diann and Jay.

Jay: By the time we use up the \$2000 and \$5000 the rodeo should have some more by then.

Rox: I don't think we can wait till then, what this all says is that we are in the hole and we need to be planning NOW for a fund raiser instead of waiting till the last minute.

Jay: And how much are the payments? \$540.00/mo for 10 months is \$6400, now I feel the rodeo is obligated themselves to pay them payments, and I would vote for it on the rodeo committee, thats what we thought. But we need to do something else. I'm not saying thats all your going to get but we need to do something else to raise that other \$2000 because we just don't have it right now.

Rox: Yes and thats what I'm saying but we can't wait until a month before we need the money we need to start now.

Diann: We're just robbing Peter to pay Paul.

Ed: If we have a deadlock, lets redo the motion, Lets make a motion that you (Jay) would submit to the Rodeo Assn. to give us

toward whatever else monies we have to make those payments, and then as a Board we need to sit down and determine what else we have to do to raise more money to make sure those payments are met.

Jay: I'll second that motion, all in favor? Unanimously passed.

Ed, "Let me get this straight. As a Board is the Park ours or isn't it? If we were to sell it for \$100,000.00 take a profit of \$50,000.00 who gets the money? the Water Co. or the Rodeo?

Jay: It's the towns, it's the Rodeo's, it's the Water Co's.

Ed: Lets have a meeting of the minds so we know what we are doing, we need to be headed in the same direction".

Rox: And I would add that if it belongs to the Water Co. then all the shareholders need to understand that if the verbal agreement we had with rodeo committee to underwrite, and in my mind underwrite means pay the monthly payments, doesn't materialize the shareholders will have to raise their water rates because there is no way we can take care of water business and buy a park with the rates we are paying today.

Jay: "No way in hell!"

Ed: OK and I would say you are right and thats the way I understood it when it was presented at the January meeting. If the Park land was sold, monies would go to Water Co. shareholders, regardless of donations made by individuals and we're going to buy the lot because we feel strongly about getting rid of that situation. We're going to use all the monies, sell the trailers, and use those monies to acquire that property for a fire house, this that, and a park. The water Co owned the lot that was traded and they are logical ones to have the property in their name, build the fire house and what ever means that go into funding that, whether it's another donation drive or fund raiser, the rodeo club has agreed to try and underwrite that.

Rox: I would agree with what your saying but then the Rodeo Committee has got to understand that 12 months worth is \$6500.00 and that should be their boggy for what they would contribute each year. For each year they don't we just fall further back in the hole.

Ed: Right, with the potential burden falling on higher water rates, which might come to the point that the Water Board says Look we've had on offer of \$80,000 for that property, perhaps we ought to sell it. Then all those people who donated their money aren't going to get theirs back, the Water Co will take that excess, build a new Water plant and the benefactors of that will be those people who have the water shares".

Rox: Do you think the other rodeo members have that much (\$6500) in their minds?

Jay: No they do not.

Diann: They don't have that much in there.

Rox: Then this would spur them to have a fund raiser quickly.

Jay: The town is the big benefactor here so they were gonna have a fund raiser one or two a year, so what the rodeo had in mind was what they didn't make, the rodeo would make up the

thing and we owe some back money that for payments, that I understand has got to be paid.

Ruth: You mean that the rodeo is only going to come up with the difference that the fund raisers don't raise?

Jay: Yes for the payments, that's MY understanding.

Ruth: Then your really depending on good fund raisers over and over and I'm not sure you can depend on them forever.

Jay: And your right and I learned that the last time because their to much work for what you make.

Ed: But we have crossed this bridge, We are going to get \$5000 in from the Rodeo Club after Jay checks with the members and with the \$5000 and \$2000 that buys a little time to make a determination of how we want to approach the remaining obligation we've got.

Rox: And we all need to recognize that we have to have another fund raiser.

Jay: We've got to have one. And if the rodeo hadn't drawn ourselves down so low last year with the \$4,000.00 donated, we went clear to the bottom of the barrel to get that up front money.

Ed: As a water user my understanding is We own that park, period and we're going to do what ever we can to get the park paid for. Ultimately its the Water Co's obligation and that involves all of us which is intertwined with everything else and everyone should know. I would hope that everyone should know this.

Jay: Fund raisers are to much work, rodeo is the way to go.

Ruth: I'm just trying to keep us out of trouble money wise and Water Co. wise. I keep 2 sets of books.

Ed: Do we still have a CD? Ruth: No.

NEWSLETTER: Rox: Response to questionnaire not as good as hoped. Majority said go with fee of \$25.00. They were in favor of self contained camping.

Jay: I'm opposed. I don't want no traffic in there. Diann made a motion "No over night parking" Ed seconded, 3 voted for the motion, 1 voted against. Roxanne made motion for a \$25.00 minimum event fee. Ed seconded. It passed unanimously. Roxanne discussed upcoming newsletter. It was decided no mention of monies made from rodeo would be included.

NEW TAPS: Ruth stated she was getting inquires about buying taps. Ruth presented a letter she received from Becky Meeks and Mrs. DeLong that afternoon from their attorney requesting 3 taps. Jay, "THEY DON'T HAVE A RIGHT AWAY AND OUT OF TOWN LIMITS AND NO MORE TAPS.

Rox: Response should be "Thank you for your interest but Gunlock has issued all 100 shares for water and none is available.

Ed: State that is out of the area the Water Co has determined it can service. One sentence that says, "Dear Mr. Hutchinson, The Board of Directors have met, the water taps have all been sold and their are none available. Sign it Jay Leavitt

Rox: In working on the water rights and the letter the Public Service Commission sent, they made reference to a form completed by Glen in 1991 that said we had water for 130 taps, I don't know where that came from, we do not have it. If we get proved up, we will have domestic use for 100 families.
Jay: That suits me just fine.

WATER MASTER: Rox: I've talked to all board members about the resignation of Mike Bracken and I've made other arrangements. My recommendation is to try for awhile the use of volunteers and hire hourly help at \$8/hr. as needed. Motion was made, seconded and unanimously approved.

Diann motioned to adjourn. It was approved.
Next meeting would be Sept. 13th at 8PM.

Ed: I want to re-think letter to attorney in that I don't think we should say no taps available. That's not key issue. Key issue is that it is out of our area of service and we absolutely can't service it, and the board has made a policy that it is out of the service area for GWUA, period. If more is needed in future correspondence, we'll respond. All agreed.

Minutes approved _____

GUNLOCK WATER USER ASSOCIATION--Board Meeting --1-17-95

The first meeting of the new Board, elected at the 1995 GWUA annual meeting, was held at the Annex on January 17, 1995 at 7:30 p.m.

Members present were: Jay Leavitt, Gail Smith, Ed Bowler, Roxanne Aplanalp, and Diane Covington.

President Smith opened the meeting by handing out copies of the agenda with the following items: Welcome to new members; Review of minutes from last meeting; Election of officers.

(At this time the electricity went off. Someone stated that it would be a short meeting anyway so we would just go ahead and elect officers in the dark. Roxanne said "Always be prepared for emergencies" and got a flashlight out of her purse. It provided enough light for the Board members to read agenda.)

President Smith welcomed the new members and wished them success. She advised that the minutes from the annual meeting had not been given to her by Larry Jessup, so no action on that item.

President Smith asked for **election of President** for the new Board and she **nominated Jay Leavitt**. Seconded by Diane Covington. **All members voted Aye**. President Smith then turned meeting over to President Leavitt. He thanked the Board and said he would need their help as he was not experienced in the paper end of the process.

President Leavitt said we need to **elect a Vice President** and **nominated Diane Covington**. Seconded by Gail Smith. **All members voted Aye**.

President Leavitt said he understood there were bills to be paid and asked what he and Diane needed to do. Discussion by Gail about going to Bank and signing signature cards. Diane said she could do it the next day.

(About this time the light came back on.)

President Leavitt said the Board needed to **resolve the water rights "prove up"** issues and asked **Roxanne** if she would be able to **help** him in this area. She agreed to do so.

President Leavitt said there were issues regarding chlorinating that needed to be resolved. Differences of opinion existed as to whether or not Gunlock had to chlorinate. He suggested we **stop chlorinating**. Both Diane and Roxanne asked how new Board members get up to speed on the rules/regulations of what and how water companies function. There was reluctance to take action on chlorinating issue till regulations understood. No specific action was taken but all members agreed need to **resolve** as soon as **get more information**.

Gail reminded Board that letter needed to go to users regarding the **failure** of the Company to **do the required nitrate test**. There was no

action taken on this item as Mr. Jessup only one with information.

President Leavitt said he had been impressed by the good job that Ruth McKean had done as Secretary and he would like to see her continue in that role. Roxanne said she also felt that this would be good as the collection of revenues/delinquencies had been the best of any year. Also if secretary is not board member you can get more detailed minutes and leaves Board members free to concentrate on discussion. She said she had discussed this with Ruth and felt Ruth would consider taking the position provided she could receive all the past information from Larry Jessup.

Also that she set up the books in the method she felt was most beneficial to the GWUA and that she have control over paying all bills. Ed Bowler asked how much Ruth was paid and Gail replied she "volunteers".

President Leavitt said "no, she gets \$100.00 a month." Roxanne said she understood Ruth was paid and felt it was worth the investment if bills and books in order. The other members were in agreement with this.

President Leavitt said he would get all past records from Larry Jessup and deliver them to Ruth. He then asked who would make job offer to Ruth.

Roxanne volunteered to make secretary job offer to Ruth at \$100.00 a month. Job duties to include setting up books, collecting monies due, paying bills, and having all past records.

Ed Bowler asked how many taps were sold. Jay responded "think 94." Ed asked about the total water capacity. Gail and Jay said around 100. Gail tried to find the printout with information but couldn't. Gail said she would find info she had gotten from Brent Gardner and bring to next meeting.

Ed asked status on water certificate for trailer court. Did the Board recover it before giving Jeff Clark certificate for cul de sac property. Gail and Jay not sure but Jay said had recovered commercial meter. Ed said he understood some records not complete on which taps have certificates.

There was a discussion about the water certificate records. Gail said Larry also had information from Delmont Truman regarding his certificate.

Ed Bowler summed up discussion saying this was area that needed to be cleaned up and Board would need to resolve any certificate that the tap owner could not provide chain of events to substantiate. It was agreed that a review of all certificates would be held at next meeting.

Goal is to have a certificate for all taps.

Roxanne asked about the incorporation status of the GWUA. She said the state had involuntary disbanded it September of 1992 and she felt this should be a top priority to resolve. Gail said Truman Bowler and Ron Thompson had been working on this but not completed. Roxanne volunteered to take over. Gail said thought Ron had about done. Gail said she would check with Ron.

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President Leavitt said he was concerned about the by-laws that had been amended verbally but no written record. In particular, the decision made by the members at an annual meeting a few years ago that subdivisions would pay for upgrading pipes. The by-laws state the water company will install but is not clear who pays for what. Ed asked what size pipe went to property by Rodeo. Jay replied continuation of 2" to Rodeo grounds. This lead to discussion of size of pipes for fire protection. Both Jay and Roxanne explained town is grandfathered under current conditions so legally okay--reality is another issue. It was decided updating by-laws would be a priority issue for this Board. Gail advised that Truman Bowler had done work in this area and wondered if he could come to next meeting and share with Board. Because of Truman's poor health, Ed did not feel good idea. Ed said he would get the information. Ed said that past verbal amendments were not worth researching as we needed to amend based on the needs of today. He felt all members should become knowledgeable on the by-laws and **come to next meeting with recommendations**. Since each of us have different areas of expertise and different ways of looking at issues, this would assure us of a more indepth review. Diane said she had never seen the by-laws. Gail gave her copy and **Diane will make 6 copies**.

There was a lengthy discussion about the **proposed SSD**. Gail read parts of 11-27 meeting minutes regarding SSD and "prove up" issues. Each Board member offered what they knew about SSD: what understood from Ron Thompson comments at 11-27 board meeting and at annual meeting; Roxanne offered what she had done on preliminary SID when pursuing fire department funding. Jay asked if we should go ahead and circulate petition to see how town felt. Most members felt unprepared to discuss questions the town people might ask. Roxanne offered to coordinate this effort if decision made to do SSD. Since 4 of the 5 members had not been at 11-27 meeting, it was decided that **Gail would ask Ron Thompson to attend our next meeting to educate new Board on SSD**. Then Board will be prepared to discuss this issue in detail and make decision on which direction to go. Ron will also be asked to give **status on incorporation**.

Then "prove up" was discussed. Gail and Jay discussed that the water company had had 3 5 year extensions to prove up water rights and state would not give another extension. GWUA now in a grace period. It was decided that "prove up" of water rights had to be the **Board's top priority** for 1995.

Ed asked what **geographical area served by the GWUA**. No one could define. This generated discussion of request by Todd Meeks for 3 taps and the previous Board's refusal due to property location. Gail asked if Ed would make a boundary recommendation based on his professional

expertise. He mentioned the Gunlock Township of the 1860's and other surveys. Ed agreed to bring recommendation on geographical boundaries to next meeting.

President Leavitt said another area that had to be resolved was the water master job. He reviewed how the position was set up several years ago when system was difficult to maintain. He went over the improvements that had been made in the spring of 1994 and how these made water testing much easier and results passing positive. He summed it up by saying the existing job description did not represent the work that was now required and did not warrant paying \$225 a month.

There was a discussion of the clean up of the trailer court, rodeo grounds, etc.. All members to think about job and Board will develop new job description at next meeting. Also what to pay. Jay said might even put out to bid. In the meantime, Mike Bracken would continue in the position. Gail asked if Board had ever received Lynn Bracken resignation and signed contract from Mike. Jay was not sure but would find out. Gail gave Jay Lynn's contract to use as sample for Mike.

This led to discussion of fire truck/station status. Water master job description requires person to keep fire truck in good running condition. Gail mentioned she finally saw the truck for the first time going down the street. Jay said Brent Willoughby had offered to keep the truck in mechanical condition. He has a shop and the know how. Jay also said Ray Sargent had volunteered to be involved and he was an EMT and a retired fire person. No action had been taken on their offers in the past. Roxanne made a motion for Jay to ask Sargent and Willoughby to take over the fire department and get it set up as needed. Seconded by Diane or Gail. All members voted Aye.

President Leavitt said he felt Board needs to meet monthly to keep everything running smooth. Other members agreed and after some discussion set next meeting for February 15 at 7:30 p.m. at the Annex if available, if not Ed offered his home in Gunlock. Board discussed regular meeting time of 3rd Tuesday or 3rd Wednesday--which might be conflict with Community Council meeting. Members are to bring calendar and determine at next meeting.

Gail summarized the Goals for 1995 as:

1--prove up water rights

2--understand SSD and make decision which way to go

3--Review and update GWUA by-laws

President Leavitt said not sure if President can do this but he made a motion to adjourn the meeting. Seconded and voted Aye. Meeting adjourned about 9:15 p.m.

Roxanne Aplanalp (In lieu of Secretary)

Summary of items discussed and action taken:

-Election of officers: Jay Leavitt, President
Diane Covington, Vice President

-Secretary: Roxanne will offer to Ruth McKean.

-Water testing: Board members need to understand regulations and then make decision on chlorinating, etc. Each member to become knowledgeable.

-Failure to test Nitrate: Need to get letter out to shareholders. No decision who would take action.

-Water capacity: Question how much water available for how many taps. Gail will provide information at Feb meeting.

-Water certificates: Not all shareholders have certificate. Review current status at Feb meeting. Objective is to have water certificate on record for each tap.

-GWUA Incorporation: Company needs to be incorporated per state laws. Ron Thompson working on. Status at Feb meeting.

-By-laws: Outdated, not amended as changes made in past. Diane will make copies for Board members. All members to review by Feb meeting and come prepared with recommendations for updating.

-SSD: Ron Thompson to explain in detail at Feb. meeting. Members come prepared to ask questions. If possible, make decision at Feb. meeting as to whether to move forward with petition. If so, Roxanne will coordinate.

-Water rights "Prove up": Top priority for 1995; Roxanne will assist Jay in resolving; Ron Thompson to attend Feb. meeting and get all members up to speed on issue

GWUA geographical boundaries: None established. Ed Bowler make recommendation at next meeting.

-Water Master Job: Job description needs to be updated; salary determined based on description; members come prepared to discuss at Feb meeting. Mike Bracken continue in present role till Board takes further action. Follow-up to be sure contract with Mike Bracken on file.

-Fire Department: Jay will ask Brent Willoughby and Ray Sargent to take over.

EXHIBIT D

GWUA BOARD MEETING MINUTES OF 4-16-96

Meeting called to order at 7:00 PM

Those in attendance were: Jay Leavitt, Diann Covington, Roxanne Aplanaip, Ruth McKean, and Ed Bowler.

The agenda called for a ^{fire department} ~~personal~~ report from John Benson. Since he was not present President Leavitt proceeded to the reading of the March 19th minutes. A motion was made to approve the minutes and seconded. All approved.

Ruth then gave a financial report saying that overall we were in good shape. The only past due accounts were from the same people, and that she was talking with these people and wasn't overly concerned.

Ruth asked if the street lights at the bridge and the other end of town were working. The response was "NO". Ruth said Utah Power had difficulty keeping their word, and would call again. Jay stated we should not have to pay if they don't work.

Diann then reported on the fund raiser for our park. The roping was going to be a 10:00 am. She had asked town people to donate their specialty for the auction. She had more tickets for those who needed them.

At this time John Benson arrived. He said he had almost finished flushing out all the hydrants, that he gave the town council board and water board members phone numbers to Mr. Baker to use in conjunction with 911 emergencies. He said we needed supplies and equipment to comply for our 9 rating, but he expected to get some free and or through donation. Calvin Bowler had volunteered to weld racks on the truck to hold the ext. ladders we have to have. If we have to pay for needed supplies it will cost about \$800.00. Ruth said you can't approve spending that kind of money and then lose it to theft and vandalism. Jay said I have a steel door we just have to get it on. Roxanne stated we can't put anything into the building until its secure. John also said we need to have Willoughbys fire truck at fire house when the next inspection comes, saying it is a donation, and that he would hold a training session on the 27th. Roxanne said she had gotten Reads Paint to donate 2 gallons of paint for the hydrants. John was then excused.

Jay said that Rods tap was not in but that he had found the phone line. He said he had talked to Calvin B. but nothing had been worked out since Calvin was now working out of town.

SSD: Roxanne said she spent 1 1/2 hrs. with Ron Thompson going over SSD's. Then a few days later she, Ron, and Ed met with commissioner Aldred, who was receptive to the idea. Ed was given the job of bringing boundary recommendation to meeting tonight. Ron said that if we do the leg work his time may not be more than 10-15 hrs. 220000

1-Fix boundaries, 2-Functions to be included, and 3- Elect or appoint board members. These 3 things he has to have to start the draft petition. It would cost \$1000.00 if we have an elected board. After much discussion a motion was made and approved to go with elected officers. It would give the people a choice. Functions would be: Water, Street Lights, Fire Dept., Park, and Cemetery. All agreed.

Ed then presented a very good map of Gunlock and surrounding area. Since the springs have to be in our boundary we started there including all our water lines to the bridge. Ed marked off the area decided on in green, saying, "We're deciding on our service area, and I'm not concerned about boundaries so much as long as the Bylaws are tight on water delivery and service. The area decided on had roughly 960 acres."

Roxanne said the bulk of our revenue will come from water rates, but then for the FD or Park if we wanted to, we could do some kind of assesement to be included with water bill or though tax collection. Pine Valley assesses \$50.00 for FD each year. If we lose our 9 rating with the inspector and go to a 10 our fire insurance will go up 20%, so it's 6's.

A motion was made to accept the map with boundaries drawn, with modification as we go along. It was seconded and approved by all.

A tentative time frame was discussed. August would be the best time for town meeting since June was to soon and July was the rodeo. We would all have to be educators till then making sure it's clear what we were trying to do is save our water and independence. Since SSD has been kicked around for 2 years and only now are we convinced it's the only way to go. We have to do our homework. Jay said it will come down to dollars. Period. Roxanne said, "It should not cost anymore".

Ed said we need to refinance our park loan, reduce the payments and with SSD, we could.

Next meeting will be May 21st at 7:00 pm.
Adjourned at 8:05 pm.

Approved _____ Date _____

SLEMBOSKI & HUTCHINSON, L.L.C.
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P. O. Box 1717
St. George, Utah 84770
Phone: (801) 628-1435
FAX: (801) 628-1489

EXHIBIT E

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

TODD MEEKS,)	
)	
Plaintiff,	)	TODD MEEKS' AFFIDAVIT
vs.	)	IN OPPOSITION TO MOTION
	)	FOR SUMMARY JUDGMENT
GUNLOCK WATER USERS)	
ASSOCIATION, INC., a Utah)	
Non-Profit Corporation, et al.)	
	)	Civil No. 960500529 CV
Defendant.)	

STATE OF UTAH)
)s.s.
COUNTY OF WASHINGTON)

Todd Meeks , being duly sworn, deposes and says the following:

1. I am the Plaintiff in this case. My statement is the same as I would give if I were to testify under oath.
2. A few days after my first request for water from what I then thought was the Gunlock Water Users Association (hereinafter referred to as GWUA), I was approached

by Rod Leavitt about my desire for additional taps.

3. Rod Leavitt is a former officer of the GWUA and is the father of Jay Leavitt, one of the Directors in 1994.

4. Rod offered myself and my partner Stephen DeLong \$1,000.00 each for our contract on the property. When I told him no, he responded that, "Before you and Steven DeLong get a drop of water, you'll walk up that [expletive deleted] Black Hill backwards."

5. A few days after my conversation with Rod, I called Gail Smith the President and asked to be present at the meeting where my request was to be discussed. My request was denied.

6. During the meeting, the minutes seem to show that there was some confusion over why I should not be given water.

7. With regard to the GWUA claim that I am outside the service boundaries, the minutes show that the officers and directors were unclear as to where those boundaries were.

8. I am unsure as to where the "main line" is and am awaiting responses to Discovery requests regarding the water lines, taps and dates they were put in. This information will help me identify whether or not the GWUA treated me differently than others in the past or differently than officers and directors and their family members.

9. I have read the Bylaws and do not see any requirement other than that the Association is to provide water to the property line of each member. Members may have

additional service lines in the discretion of the Board of Directors. The Directors' approval may be made conditional upon such provisions as they determine necessary to protect the interests of other members. Nowhere does it require that the additional lines be "adjacent to the main line." Nowhere does it state the boundaries of the service area.

8. I am currently involved in a property dispute with Jay Leavitt. I am preparing to file a quiet title action because Jay is using property that belongs to myself and my partner which is on the Gunlock side of the river. Both Jay Leavitt and Rod Leavitt have water taps near my property which I believe are not near the main line. They water their animals with it.

9. I believe that Paul Leavitt and Ed Bowler have taps which are on the other side of the river from what GWUA claims is the main line. Paul Leavitt's tap line washed out sometime in 1995 and the GWUA paid to have the line replaced. In fact, I believe that the new line was an 8" line, which was an upgrade over what he had had before. Paul Leavitt's property does not appear to be near to or even adjacent to "the main line".

10. I also believe that a "spur" has been run to Truman Bowler's property on the mesa above the town pond which is not adjacent to the main line.

11. There are several other "spurs" which would not be adjacent to the main line.

12. Following my first request for water, and prior to it, I was not informed of the need to substantially upgrade the system or that it would require additional service

lines. In fact, in the Minutes of the Meeting where I was denied, there were several reasons for denying my request, none of which seemed to be the “official” reason.

13. In the December 27, 1994 meeting which denied my request for additional taps, the comment was made that there had been a Motion to require people developing outside of the City limits to pay for getting the water in, but that they had not had the Amendment formally adopted or attached to the rules.

14. The Minutes of January 17, 1995 showed that no one could define the geographical area served by the GWUA and such boundaries were not formally approved by the Board until April 16, 1996.

15. Minutes of the Corporation dated December 13, 1995 (four and a half months following the second rejection of my request, the Board stated there could be a sale of new taps. On January 6, 1996, the Minutes indicated that there could be a total of 128 taps instead of the 100 originally claimed by the Association.

16. On August 18, 1991, the Board approved two taps for Florence Leavitt. The field she owns lies next to Plaintiff's property. Additional taps have been purchased for other members, or family members of Officers and Directors. Kip Bowler bought two taps for he and his ^{father} ~~brother~~ on February 19, 1994. On the same date, Steve Holt bought one and Gail and Hyrum Smith bought three taps.

17. I gave the GWUA money, thinking it was a Corporation from September of 1992 until the present. I trusted that they would provide water and protect my assets.

I believe that they failed to act in a fiduciary manner.

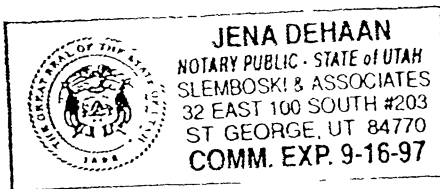
FURTHER AFFIANT SAITH NOT.

Todd Meeks

Todd Meeks, Plaintiff

SUBSCRIBED AND SWORN TO before me this 9 day of ^{September}~~August~~, 1997.

S
E
A
L



Jena Dehaan
NOTARY PUBLIC

9-16-97 Commission Expiration

EXHIBIT F

GUNLOCK WATER USERS ASSOC.

Minutes of the Board Meeting of August 22, 1994

Gail Smith called the meeting to order at 7:45 PM. Those in attendance were: Gail Smith, Truman Bowler, Mike Bracken, Jay Leavitt, and Ruth McKean.

Gail asked if everyone was up to date on the purchase of the trailer court. Everyone was. ←

The upcoming fund raiser on September 24th was discussed. It was decided to proceed with it as planned. An auction on donated items and a door prize would be part of the program.

Truman stated that all stockholders should be given the chance to donate and contacted by a Board member. Other names were considered and assigned to different members to contact. Truman said that the donations were suppose to be tax deductible and we would need receipts.

In the interest of time the minutes of the meetings of May 31, and July 16th, copies of which had already been given out-were approved.

Gail asked about the past due accounts. Ruth reported that it was down some but still high. It was stated that the Water Co. had no business getting into the welfare business. The By-Laws clearly state how to handle these accounts. Gail said that an ultimatum should be given to the past due accounts stating a date that the water will be turned off per the By Laws.

Non Use accounts that are past due can have their taps taken away and Ruth was asked to research the By Laws for this information and to inform the owners of such.

Certificates and the need to get them currant was discussed. Many accounts do not have certificates. Ruth thought that the old certificates should be placed in the safety deposit box. Gail asked Ruth to work on this and get it currant.

Ruth suggested that water rights should have a separate record from monthly water fee. Mike said Wallace Brown had an application form made up for anyone wanting to purchase a tap, and wondered if that had been dropped. Obviously it had. Mike said he might have some.

Truman gave a report on the letter that came to him from GE stating that we had not filed the proper reports with them. Truman inquired if we had a problem and he was told "Yes, you have". This was a Tuesday and Truman asked GE if he could get the reports to them by Friday would that take care of the rest

and he was told that it would. Mr. Bowler then called Nick and did not leave anything to be misunderstood. He told Nick that "It would be done".

Truman said that the day before yesterday Nick had called and stated that the matter had been taken care with GE Capitol.

Mike said the service from Mr. Lang was not very satisfactory and a change should be made. Truman suggested the change should come at the end of the year.

Gail said she would contact Larry about the bank statements.

Gail had 2 survey's that needed to be filled ou and gave them to Ruth to be done.

Mike said he would turn over the years water reports to her as soon as he got one for August.

Mike said that the chlorination building would have to be cooled before next summer or we would burn up the equipment from the heat.

Truman said that he had talked to Ron Thompson about proving up on the water and re-instatement as a corporation. Gail said she had talked to Ron today and that he (Ron) would make a phone call to Brent Gardner and would get back to her on this matter.

Gail reported on the water system upgrade. She had an estimate of the probable cost and a map on the location of the new tank. She also had a probable cost for continuing with an 8" line on though Gunlock, with meter replacement, fire hydrants, and etc. She said that if they (the Smiths) came up with the money at 6% - for 10 years it would be more than we could afford. Brent told her that with all we were doing that we could get the money from Water Resources at 5% for 20 years, which would be about \$900.00 a month, with a \$24.00 a month per household charge.

This loan would replace the loan with GE Capitol. We pay GE about \$550.00 a quarter.

Gail said the project could be started in October.

Truman said we need to get a pay off from GE Capitol. Mike said they had sent us one last year.

Mike asked if we were going to put this before the stockholders? Gail asked if we as a board could do this? Mike stated that he wasn't so sure he wanted to without putting it before the stockholders. Jay said he was for any improvement if feasible. Ruth said that she felt the stockholders were expecting to vote on the matter.

Mike said "We owe it to the people to let the them know-right down the line, what the Smith's are donating, and by them donating this-then we need to do this for this price. It's going to cost this amount of money, and by the show of hands or by a cast of ballots get their blessing."

Jay said we needed to know exactly how much it is going to cost the stockholders.

Gail said Water Resources would be the better way to go since we get better interest rates over a longer period time.

Before a date for a general meeting could be set Truman thought we needed more than estimates of costs. Gail said she was meeting with Brent in the morning and would corner Ron Thompson to get final figures, so that we could set up a date.

Jay said we had people very interested in buying the trailers and that it was time to legally get the trailer court emptied. Mike said that some of the people had indicated that they were not going to move. Cutting water service could be an option to get things going. Truman said that he owns a trailer court and it can be costly getting people out.

Mike made a motion to do it legally and quickly. Jay seconded the motion. It was decided to have an attorney draw up the evictions and have a process server, serve them.

Titles to the trailers are with Southern Utah Title.

Jay said if we get \$1,000.00 for each triler we would be doing good. Everyone agreed and gave Jay the go ahead on selling the trailers.

Gail said it was time to end the meeting and Jay seconded the motion. It was 9:40 PM.

Minutes approved 10-16-94 

GUNLOCK WATERS USERS ASSOCIATION
BOARD OF DIRECTORS MEETING

MINUTES

JANUARY 9, 1995

The meeting was called to order by President Gail Smith at 6:50 PM. Those present were Jay Leavitt, Mike Bracken, Larry Jessup, Gail Smith, also in attendance was Ron Thompson and Nick Lang.

Gail reviewed the agenda items for the annual stockholders meeting to be held later in the evening. Jay was asked to give a brief statement on the status of the town park. Mike Bracken was asked to give a status report on the water system and the springs. Both said they would.

A motion was made to wave the reading of the previous minutes in the interest of time. The motion carried.

Gail introduced Ron Thompson and said she had invited him to come up and speak to the Stockholders about the Pro's and Con's of a special service district.

Gail then turned the time over to Nick Lang for the presentation of the financial statements. Nick explained the statements and gave mention to the increase in supplies inventory and he noted the increase in water fees helped us meet our budget this year.

Nick also mentioned that in his review of the minutes he did not find any minutes that reflected a vote on purchasing the trailer park. It was suggested we amend the minutes to reflect the purchase.

Mike Bracken made a motion to amend the July 16th Minutes as follows:

It is proposed that the Gunlock Water Users Association purchase the property known as the trailer park and take whatever steps are necessary to secure title, financing and funds

The motion was seconded by Jay Leavitt. The voting was unanimous by the four board members present.

Larry Jessup motioned that we accept the financial as presented by Nick Lang. Jay Leavitt seconded and the voting was unanimous

Gail Smith informed the board that due to personal commitments for 1995 she would be unable to serve again as President but was willing to serve as a board member if she were re-elected

Gail motioned to adjourn the meeting it was seconded and voting was unanimous. The meeting was adjourned at 7:15 PM.

Approved: _____

Date: _____

(105)

EXHIBIT H

GUNLOCK WATER USERS ASSOCIATION

Minutes of the Board Meeting of October 16, 1994

Gail Smith called the meeting to order at 7:00 PM at the home of Truman Bowler.

Those in attendance were: Gail Smith, Truman Bowler, Mike Bracken, Jay Leavitt, Larry Jessup, and Ruth McKean.

The minutes of August 22, 1994 were read and approved.

First on the agenda was the trailer court. Gail said she had talked to Ron Thompson and that a hearing was being held this coming Thursday on the eviction of the last trailer. But Truman and Jay both said an eviction order had already been issued for Murphy. A discussion followed indicating that Ron was not current on what was happening. Truman said that he had posted a \$1500.00 bond out of his own pocket since Ruth was out of town and there was no one else around. The check would just be held and should be returned in full.

Truman stated that Mr. Montgomery had not taken any action concerning the three options the court had given him. The options were - move, put up a cash bond, or request a hearing within a time limit. Therefore Judge Eves had issued the eviction order.

Jay reported that Scott Butcher had moved and his trailer was for sale. Jay indicated he could help get the trailer sold if needed. He reported that Jack Murphy had purchased property in Beryl, but that he could see that they might still be a problem.

Truman said that the trailer that Ken Karlson bought was the one we needed to be most concerned about. Jay made a motion to continue legally if necessary to get the trailer court emptied. Mike seconded the motion. Gail asked Truman to follow up on this.

Larry said he needed all information on the trailer park transaction for journal entries. He said he would come by and get the documents from Ruth. He also needs the dollar amounts from donations. Larry indicated that no one contacted him for a donation, and that he thought the Rodeo was going to do the purchasing.

Jay said because the Rodeo is non profit it could not hold title.

Mike said there was not time to do things any differently than they were done.

Nick Lang and his services were discussed. Mike restated he didn't think they were doing a very good job. Larry said that he felt the problem was with General Electric. Truman said that Nick had not sent in the necessary papers and that was why GE had called him. Larry said that Nick had been performing the accounting services at a much reduced rate and that we are getting what we pay for. A decision would be made at the end of the year about this matter.

Jay said we needed to have a fund raiser because the Rodeo couldn't handle all the expenses for the park until the next rodeo in July.

The original idea for a fund raiser in late September just did not materialize. Other ideas were talked about but with the deer hunt and holidays upon us a fund raiser seemed doomed.

It was decided that between the Water Company and Rodeo we could manage the payments to Andy Wilson until February or March when we could plan a way to raise money.

Jay suggested that we needed to have a caretaker for the new park and that a couple could live in the first trailer space and live rent free for taking care of the watering, mowing, cleaning up after reunions, and being a watchman.

Mike stated that the firehouse had been vandalized again.

Gail suggested we pursue a Special Service District because it allows for governmental liability. Larry stated that this was an option Truman had brought up when he first came on the board and would make a lot of monies available. Truman stated that it would be a taxable district if put in place. Gail asked Truman to look into the pro and cons.

Jay said that he had heard from Washington County on the garbage collection and that he had asked them to pick up 6 canisters and send the bill to us for collection. Jay said he would call them to pick up 2 more of the canisters.

Larry said he had reconciled the bank statement

Ruth asked where in the By Laws it covered non payment of non use taps. Off hand no one knew.

Jay said that the Heaton tap was completed and now an active tap.

Ruth had some bills approved for payment

Mike said he had purchased a bunch of boxes for redoing his irrigation system and that the Water Co. had been using them up one at a time. One at Adams place, one at Lorin Jones, and one at Heaton's, and that he needed to be reimbursed for them. Gail told him to give receipts to Ruth for payment. He said he didn't

know what he had paid for the last one or the parts he had purchased for the job at Heaton's, which was a mess.

Jay said the whole main needs to be replaced.

Approval was given to install a tap for Rod Leavitt that he asked for 2 years ago.

Certificates and whether everyone has one was talked about. Larry said if a transfer certificate is not provided there is a \$6.00 charge for a new one.

Truman said Lin Bracken called and asked that Mike be paid until he is able to return to the job. Mike said that his father wants the check to be in Mike's name. Gail asked if Mike wants to be Water Master and Mike stated that he would until Lin could resume the job. Larry said Lin had a contract and the issue is where the 1099 should go and Mike said it should go to him for now. It was decided that Lin should give us a letter cancelling his contract and then get a new contract with Mike. The letter was to be given to Ruth for the files. Ruth was asked to make master copies of the contract to keep on hand.

Mike said that 5 days prior to the water sample going out he fires up the chlorination system, takes the sample and then shuts it off. The reason for this is to keep from burning up the pump due to the extreme heat this summer. He asked if he should continue this way or chlorinate daily.

Gail said that some communities don't chlorinate at all and wondered if perhaps Gunlock would not fall into this category. Mike said we had the July sample pass with no chlorine added. It was noted that the springs were in excellent shape and there had been no shortage of water and the pump was being used very little.

Gail indicated that with the delay of the new storage tank she and Hyrum had diverted the money for same to another project they were involved in. They felt that with the new park to pay for and fix up that the tank should be put on hold for now. She also said that Ron Thompson was ordering 5 - 420 thousand gallon tanks at a cost of \$80,000.00 including bringing them here. She spoke to Brent about this and all that would be needed would be site preparation. Jay said if we decided not to go with a concrete tank he might know where to locate a 500 thousand gallon metal one. The price was \$18,000.00 unassembled.

Gail said engineering prices were going up along with everything else so no matter what we did it would cost a lot more in the future.

Gail submitted a letter of resignation because she felt she could not live up to her responsibilities due to long absences from the town. All board members asked her to stay until the end of the

year and felt that she had done a very good job and everyone would pull together to get through to the year end. Mike made a motion that the resignation be tabled and it was seconded.

Truman spoke for all when he said she was a real asset to the Water Co.

Larry said that we needed one meeting at the end of December before our annual meeting.

Ruth reminded them that she would be leaving at the year end also.

Larry said the minutes needed to be reviewed by an attorney concerning the purchase of the park. Truman stated that he had talked with Ron Thompson already and was told we were within proper bounds. Larry still felt it better to have this done.

A meeting was set up for November ²⁷~~28~~^{5:30}th at 7:00 PM at Truman Bowlers.

The meeting adjourned at 8:50 PM.

Minutes approved 11-27-94 Ruth Miller Sec.

EXHIBIT I

Gunlock Water Users Association
Board Meeting of February 15, 1995

Meeting called to order by President Jay Leavitt at 7:30 pm.

Those in attendance were: Jay Leavitt, Roxanne, Aplanalp, Diann Covington, Ed Bowler, and Ruth McKean.

Ron Thompson was a guest.

Copies of the minutes had been given out ahead of time to all members in order to conserve time.

President Leavitt asked if everyone had read them and if there were any changes. There were none and a motion was made and seconded to approve the minutes. All approved.

It was noted that Ruth McKean had drawn up an amendment to the July 16, 1994 board meeting showing approval to purchase the trailer park. Nick Lang had made the suggestion this be done during the January 9, 1995 Board meeting. A motion was made and seconded with all approving for this amendment.

It was noted that Roxanne put together and handed out books to each member to keep their board business in. Jay thanked her and said they were done very nicely.

Roxanne made a brief explanation of how the book came together.

On the previous Saturday some of the board members had gone on a field trip of the water system. Jay had explained the operation of our system and took the members to all pertinent points. As we went along on this study an environmental form for the state was filled out. And after the trip Roxanne made a map of the entire water system. Each member was given a copy of this map and only one mistake was noted and corrected.

Ruth gave a brief update on the past due accounts and noted that they were a little past due but overall in good shape. It was noted that Robyn Panella is still unhappy about being charged for 2 use taps even though she only has one line coming into her property. Jay explained that this was an oversight made in the past. They originally build one house and had one tap. Then they built the second home and they rented this home. Since our Bylaws state that we can not service 2 homes on one tap Mrs. Tanielian then purchased another tap. Then the homes were vacant for a long period of time. In 1992 Robyn Panella purchased the home and in time rented the second home. The matter was then brought to the attention of the board when a letter was received asking about a non use tap that should be a use tap. After a search it was determined to be Panella's. The board decided to start billing for 2 use taps but for whatever reason the secretary did not implement this. Ruth stated that it was last May that she brought it to the boards attention and corrected the

billing. Since then she had paid slow and complained of the second charge as being unfair.

Ed said that he felt the Bylaws were a bit ambiguous, and that allowed the board a common sense approach, but that he had no problem with her paying for 2 use taps. Roxanne stated that the plat map indicated that Roybn no longer owned the lot next door. That it was in her brother and sisters names. Jay asked who owned the taps. Ruth said that Roybn did. Roxanne asked if one of the taps could have been assigned to the other piece of property and Jay said it was indeed assigned there from what he had been able find out.

At this time Ron Thompson arrived and Jay turned the time over to him to talk about Special Service District. (SSD)

Ron said that if you are just doing water you may be alright just the way we are. But as things go along communities eventually want fire protection, parks and etc. And the Water Co isn't really in a position to umbrella these. SSD does away with shares and voting 1 vote for 1 share. It would be just 1 vote per person regardless of how many water shares you own. SSD are created by going to the County and petitioning them and then holding public hearings, placing notices in the paper, clearly defining your service area. The area can or can not be a taxing area. The board would be the governing authority, which can be voted in or appointed by the county commission. Ron indicated you would have mostly the same people serving.

Ron said that only registered Gunlock voters could vote in an election with in Gunlock alone. So if you own property in Gunlock and live else where you may not vote. But you can attend all public meetings to have input. SSD deliver a specific kind of service that is beyond what the county or city contemplates delivering to residents within a specific geographical area.

Roxanne asked if a fee is assessed and that if a fee is to use for both water and fire then would you set 2 or 3 different fees depending on what piece of SSD you get served out of? Ron said "Yes you could". He said WE need to define where our boundaries would be. Ed said that just because they are in the SSD area doesn't necessarily mean that you will get all the services. Ron Agreed. Ed said it is up to the board as to what happens in the area and what is provided. It can be a tax or fee depending on how you decide to structure you SSD.

Ron stated that he thought the commission would honor what ever the community voted on, and Jay stated that we would get good and bad depending on your point of view. He said our streets are bad, the cemetery needs help, and our water system needs attention.

Ron said that when a small town like Gunlock start needing municipal services and the county starts providing them, your

cities start complaining because their taxing their people to provide this service

Jay asked "With the liability on the fire house and the park and the streets that need attention, does the bad outweigh the good?, and Ron answered "Only the people can answer that".

Ron suggested that we talk to people who have SSD. Silver Reef, Dixie Deer, Ash Creek are some.

Roxanne said she had talked to Pine Valley which is limited to fire alone. They charge \$50.00/yr. on a fee basis. Ron said that their biggest problem is getting someone to serve.

Jay asked Ron to update us on our incorporation. Jay said that he, Truman, and Gail had signed the papers the end of last year. Ron said he would find out if it had gone in and would let Jay know. Roxanne said she had called the State today and they still had nothing on the update. Ron said he would certainly check. He went on to explain how the card that is sent out to us every year to list our officers was not returned 2 years ago. Then you receive other warnings and if you fail to comply you get dis-incorporated. That card nor any subsequent notices were answered and we were terminated as a corporation. So we had to start over.

Roxanne said she had called the state today and they still had nothing on the update. Ron said he would certainly check.

He also said even if the Incorporation isn't complete there are very few instances where the corporate umbrella won't protect us.

Ron said that he had checked on our water rights and we have 2 years to perfect it or file for another extension.

Ed asked if fire insurance in town was high because we have no real fire department. He was told yes, which made him concerned that the Water Co. was in charge of the Fire Department. Jay stated that there had been a lot of discussion on this and that the Water Co had tried to give it to the town council, they said no dice, so the fire truck, and fire house are still listed as Water Co assets. It all fell back on us. Ron stated the Bylaws do not give us the authority to provide fire protection. Jay asked then who should be responsible? Roxanne said the county shows Ivins as our Fire Dept and if you call 911 Ivins will respond.

Ron stated our charter does not allow for us to run street lights, fire protection, or a park, but if we want the Bylaws to be changed to include these then it could be done.

Ed said he didn't want the board to be responsible for anyone's house burning down. Roxanne agreed. Ron suggested we tell the

community council "It's your problem". We'll try to have a water system may works, we don't owe that to you, but if you turn on a fire hydrant and it works, great, but if it doesn't, then you should have done something more. Ed Agreed. We can do whatever to help but should not incorporate the fire dept into our Bylaws.

Jay thought the truck should be keep in good shape, a fire chief should attend the meetings and get any free money we can because that little fire truck can put out a fire.

Ron said the county should insure the fire truck and we should not show it as an asset on our books. Tell your volunteer fire department you will help them but that is all you should do. Jay said that Brent Wiloughby had accepted the fire chief job and would attend the meetings.

FLOOD The flood had washed out the line to Paul Leavitts home and needed to be fixed. Roxanne asked if this was part of the distribution line? A discussion followed about who was responsible for the repair. It was decided that it belongs to the Water Co. Jay said if we fix it he wanted to do it right and it would be expensive. Jay said that Roxanne had asked 5 days ago while on the field trip who would repair this line in case of a flood. Two days later we had a flood. Since it is a delivery line the Water Co is responsible. The irrigation line was also taken out so maybe we could work together on repairs and do it right.

Ron said when someone adds on to your system you should make them meet county specs.

Ed thought maybe we could joint venture the expense with Paul, Truman, the Irrigation Co. and us.

WATER SAMPLING Jay said we need to get currant on the past due sampling. Roxanne said she would be attending the upcoming Rural Water workshops in St. George and reporting back to the board. Ron said they were an excellent source of information and were worth the expense of becoming a member. Ruth said the membership had lapsed and a motion was made, and seconded and approved to re-join.

Ruth reported the letter on the failure to test for Nitrates had gone out to the sharehoulders and she had the bottle and necessary papers for doing the test which she gave to Jay. He said he would deliver to Mike. She also gave Jay the list of the water tests we had to do on a regular basis to give to Mike.

TESTING Since testing is our biggest nightmare Jay appointed Roxanne to over-see testing and make sure the Water Master does everything on time.

WATER TAPS There are 96 taps sold. Which leaves 4 taps ~~left~~ out of the 100 taps we have right now. The state requires .898

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WASHINGTON COUNTY

BY

IN THE FIFTH JUDICIAL DISTRICT COURT
FOR WASHINGTON COUNTY, STATE OF UTAH

TODD MEEKS,)	
)	
Plaintiff,	)	MEMORANDUM DECISION
)	
vs.	)	Civil No. 960500529
	)	Judge G. Rand Beacham
GUNLOCK WATER USERS)	
ASSOCIATION, INC., et al.,)	
)	
Defendants.)	

This matter comes before the Court upon defendants' Motion for Summary Judgment, which was filed August 13, 1997 with a supporting memorandum.¹ Plaintiff filed his Objection and Memorandum In Opposition on September 12, 1997. Each party filed affidavits. Oral argument was heard on October 23, 1997. Having fully considered the matter, the Court issues this memorandum decision.

FACTS

Defendants' Memorandum contains a "Statement of Uncontroverted Facts" which, with two exceptions, correctly sets forth the facts asserted by defendants in separate numbered sentences with specific references to the record, including defendants' affidavits. Paragraphs 2 and 4 of defendants'

¹Although the title of the motion is "Defendant Gunlock Water Users Association Inc.'s Motion for Summary Judgment," it appears from the text of the motion and from oral argument that all remaining named defendants make this motion, and the Court has considered the motion with this understanding.

facts are actually conclusions of law. Otherwise, defendants have properly presented the facts upon which they rely for their Motion. Cf. Rule 4-501(2), Code of Judicial Administration.

Plaintiff's Memorandum includes a "Statement of Facts" which fails to specifically controvert any fact asserted by defendants or to make any specific reference to defendants' facts. Plaintiff's statement contains no citations to the record, except for references to exhibits which are not presented with any foundational affidavits. Plaintiff's statement does not even refer to plaintiff's own affidavit. In short, plaintiff has failed to controvert defendants' statement of facts and has failed to provide the necessary support for his own statement of facts.

In these circumstances, paragraphs 1, 3, and 5 through 10 of defendants' statement of facts are "deemed admitted for the purpose of summary judgment." Rule 4-501(2), Code of Judicial Administration.

ANALYSIS

Each party's argument refers to a period of time in which defendant Gunlock Water Users Association, Inc. apparently was not incorporated. Unfortunately, neither party has provided the Court with any properly supported statements of fact regarding this condition and period of time. Consequently, the Court does not consider such "facts" in this decision.

Plaintiff's Amended Complaint attempts to state three causes of action: Breach of Contract; Violation of Fiduciary Duty; and "Right to Amend The Complaint." The third of these is not a cause of action at all, but an apparent attempt to skirt the requirements of Rule 15 of the Utah Rules of Civil Procedure. This is invalid and ineffective, and, as a matter of law, plaintiff can take nothing from this assertion.

Defendants' primary attack on the "Violation of Fiduciary Duty" claim is under URCP Rule 23.1. Defendants argue that a suit for breach of fiduciary duties by corporate officers and other agents must be brought as a derivative action on behalf of the corporation, not in a suit by an individual shareholder. The language of Rule 23.1 does not support this argument; the language of the Rule appears to apply when a plaintiff has chosen to file a derivative action, but not necessarily to require that choice. The cases cited by defendants do support that argument, however. For example,

Directors and officers of a corporation owe a fiduciary duty to their corporation. *Richardson v. Arizona Fuels Corp.*, 614 P.2d 636, 639 (Utah 1980). Any fiduciary duty owed to shareholders of a corporation is owed to the shareholders collectively and not individually. *Id.*

Pond v. Equitable Life and Cas. Ins. Co., 872 P.2d 1070, 1072 (Utah App. 1994).

Plaintiff now concedes that his case should have been filed as a derivative action, but argues that he may maintain this case as it is because (a) "an unincorporated entity" was in business for some period of time and (b) the persons who acted for the "unincorporated entity" during that time should be personally liable. As noted above, there are no facts before the Court on which such an argument could be based.

On the basis of the facts before the Court, defendants are correct. Plaintiff cannot maintain the claim made in his "Second Cause of Action" as an individual shareholder. There are no genuine issues of material fact and this claim must be dismissed as a matter of law.

Plaintiff's "First Cause of Action" is titled "Breach of Contract." In it, plaintiff alleges that defendants' actions have been "prejudicial against him," "discriminatory practices against him," "an

abuse of any discretionary powers” and “in bad faith,” and have constituted violations of the Association’s “Bylaws or practices,” violations of fiduciary duties, and “wilful and discriminatory actions.” In argument, plaintiff asserts that the actions of defendants (which are not included in the facts before the Court) create some kind of contract or “constructive trust.” Plaintiff cites no authority for such an argument, and the Court is aware of none.

Defendants’ Motion simply asserts that defendants acted within the scope of their authority. The facts before the Court support defendants’ argument and entirely fail to support plaintiff’s claim. Plaintiff has not demonstrated any genuine issue of material fact, and defendants are entitled to summary judgment on this claim as a matter of law.

CONCLUSION

Defendants are entitled to summary judgment dismissing plaintiff’s Amended Complaint with prejudice and on the merits. Counsel for defendants is hereby ordered to submit an appropriate judgment pursuant to CJA Rule 4-504.

Dated this 11th day of November, 1997.


G. Rand Beacham, District Court Judge

Certificate of Mailing or Hand Delivery

I hereby certify that on this 12th day of November, 1997, I provided true and correct copies of the foregoing MEMORANDUM DECISION to each of the attorneys named below by placing a copy in such attorney's file at the Washington County Hall of Justice and/or by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

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